

Senate Bill No. 402

(By Senators Wills, Kirkendoll, Klempa, McCabe, Minard, Palumbo,
Tucker, Williams, K. Facemyer, Nohe and Foster)

[Introduced January 24, 2012; referred to the Committee on the
Judiciary.]

**Interim
Bill**

A BILL to amend and reenact §29A-1-2 and §29A-1-3 of the Code of West Virginia, 1931, as amended; to amend and reenact §29A-3-1a, §29A-3-4, §29A-3-6, §29A-3-8, §29A-3-15, §29A-3-15a and §29A-3-15b of said code; and to amend said code by adding thereto three new sections, designated §29A-3-1c, §29A-3-1d and §29A-3-9a, all relating to review of state administrative agency rulemaking; defining terms; altering designation of types of rules that have not been approved by the Legislature and that are exempt from legislative review; establishing deadline for action by agency action for certain proposed rules before the rule is deemed withdrawn; requiring agency response to public comments; requiring all sections of a rule be filed when agency proposing rule amendment; providing for methodology for repeal of rules; establishing new publishing

1 and rule-making requirements for certain Department of Health
2 and Human Resources policy manuals; providing new process for
3 review and approval of legislative rules incorporating federal
4 mandated requirements; revising emergency rule-making process
5 to allow for public comment, more information and extended
6 comment period; providing new process for provisional
7 legislative rules; and altering certain agency filing
8 requirements.

9 *Be it enacted by the Legislature of West Virginia:*

10 That §29A-1-2 and §29A-1-3 of the Code of West Virginia, 1931,
11 as amended, be amended and reenacted; that §29A-3-1a, §29A-3-4,
12 §29A-3-6, §29A-3-8, §29A-3-15, §29A-3-15a and §29A-3-15b of said
13 code be amended and reenacted; and that said code be amended by
14 adding thereto three new sections, designated §29A-3-1c, §29A-3-1d
15 and §29A-3-9a, all to read as follows:

16 **ARTICLE 1. DEFINITIONS AND APPLICATION OF CHAPTER**

17 **§29A-1-2. Definitions of terms used in this chapter.**

18 For the purposes of this chapter:

19 (a) "Agency" means any state board, commission, department,
20 office or officer authorized by law to make rules or adjudicate
21 contested cases, except those in the legislative or judicial
22 branches;

23 (b) "Contested case" means a proceeding before an agency in

1 which the legal rights, duties, interests or privileges of specific
2 parties are required by law or constitutional right to be
3 determined after an agency hearing, but does not include cases in
4 which an agency issues a license, permit or certificate after an
5 examination to test the knowledge or ability of the applicant where
6 the controversy concerns whether the examination was fair or
7 whether the applicant passed the examination and shall not include
8 rule making;

9 (c) "Agency-promulgated rule" means any rule an agency is
10 authorized by the Legislature to promulgate that meets all
11 requirements of being considered a legislative rule except for the
12 authority granted by the Legislature to the agency expressly allows
13 the agency to proceed with final adoption of the rule without prior
14 specific authorization by Legislature rule enactment pursuant to
15 section nine, article three of this chapter. An agency-promulgated
16 rule to be lawfully promulgated shall comport to all other
17 requirements of this article and shall have the same force and
18 effect as a legislative rule.

19 ~~(e)~~ (d) "Interpretive rule" means every rule, ~~as defined in~~
20 ~~subsection (I) of this section,~~ adopted by an agency independently
21 of any delegation of legislative power which is intended by the
22 agency to provide information or guidance to the public regarding
23 the agency's interpretations, policy or opinions upon the law

1 enforced or administered by it and which is not intended by the
2 agency to be determinative of any issue affecting private rights,
3 privileges or interests. An interpretive rule may not be relied
4 upon to impose a civil or criminal sanction nor to regulate private
5 conduct or the exercise of private rights or privileges nor to
6 confer any right or privilege provided by law and is not admissible
7 in any administrative or judicial proceeding for such purpose,
8 except where the interpretive rule established the conditions for
9 the exercise of discretionary power as herein provided. However, an
10 interpretive rule is admissible for the purpose of showing that the
11 prior conduct of a person was based on good faith reliance on such
12 rule. The admission of such rule in no way affects any legislative
13 or judicial determination regarding the prospective effect of such
14 rule. Where any provision of this code lawfully commits any
15 decision or determination of fact or judgment to the sole
16 discretion of any agency or any executive officer or employee, the
17 conditions for the exercise of that discretion, to the extent that
18 such conditions are not prescribed by statute or by legislative
19 rule, may be established by an interpretive rule and such rule is
20 admissible in any administrative or judicial proceeding to prove
21 such conditions.

22 ~~(d)~~ (e) "Legislative rule" means every rule, ~~as defined in~~
23 ~~subsection (I) of this section~~ proposed or promulgated by an agency

1 pursuant to this chapter. Legislative rule includes every rule
2 which, when promulgated after or pursuant to authorization of the
3 Legislature, has: (1) The force of law; or (2) supplies a basis for
4 the imposition of civil or criminal liability; or (3) grants or
5 denies a specific benefit. Every rule which, when effective, is
6 determinative on any issue affecting private rights, privileges or
7 interests is a legislative rule. Unless lawfully promulgated as an
8 emergency rule, a legislative rule is only a proposal by the agency
9 and has no legal force or effect until promulgated by specific
10 authorization of the Legislature. Except where otherwise
11 specifically provided in this code, legislative rule does not
12 include: (A) Findings or determinations of fact made or reported by
13 an agency, including any such findings and determinations as are
14 required to be made by any agency as a condition precedent to
15 proposal of a rule to the Legislature; (B) declaratory rulings
16 issued by an agency pursuant to the provisions of section one,
17 article four of this chapter; (C) orders, as defined in ~~subdivision~~
18 ~~(e)~~ of this section; or (D) executive orders or proclamations by
19 the Governor issued solely in the exercise of executive power,
20 including executive orders issued in the event of a public disaster
21 or emergency;

22 ~~(e)~~ (f) "Order" means the whole or any part of the final
23 disposition (whether affirmative, negative, injunctive or

1 declaratory in form) by any agency of any matter other than rule
2 making;

3 ~~(f)~~ (g) "Person" includes individuals, partnerships,
4 corporations, associations or public or private organizations of
5 any character;

6 ~~(g)~~ (h) "Procedural rule" means every rule, ~~as defined in~~
7 ~~subsection (f) of this section~~, which fixes rules of procedure,
8 practice or evidence for dealings with or proceedings before an
9 agency, including forms prescribed by the agency;

10 ~~(h)~~ (i) "Proposed rule" is a legislative rule, interpretive
11 rule, or a procedural rule which has not become effective pursuant
12 to the provisions of this chapter or law authorizing its
13 promulgation;

14 (j) "Provisional legislative rule" means a legislative rule
15 that the agency has been directed by law to propose, to be
16 effective for a limited time as a legislative rule prior to
17 legislative authorization for promulgation as a legislative rule,
18 pursuant to this chapter.

19 ~~(i)~~ (k) "Rule" includes every regulation, standard or
20 statement of policy or interpretation of general application and
21 future effect, including the amendment or repeal thereof, affecting
22 private rights, privileges or interests, or the procedures
23 available to the public, adopted by an agency to implement, extend,

1 apply, interpret or make specific the law enforced or administered
2 by it or to govern its organization or procedure, but does not
3 include regulations relating solely to the internal management of
4 the agency, nor regulations of which notice is customarily given to
5 the public by markers or signs, nor mere instructions. Every rule
6 shall be classified as "legislative rule," "interpretive rule" or
7 "procedural rule," all as defined in this section, and shall be
8 effective only as provided in this chapter;

9 ~~(j)~~ (1) "Rule making" means the process for the formulation,
10 amendment or repeal of a rule as provided in this chapter.

11 **§29A-1-3. Application of chapter; limitations.**

12 (a) The provisions of this chapter do not apply in any respect
13 whatever to executive orders of the Governor, which orders to the
14 extent otherwise lawful shall be effective according to their
15 terms: *Provided*, That the executive orders shall be admitted to
16 record in the State Register when and to the extent the Governor
17 ~~deems~~ considers suitable and shall be included therein by the
18 Secretary of State when tendered by the Governor.

19 (b) Except as to requirements for filing in the State
20 Register, and with the Legislature or its rule-making review
21 committee, provided in this chapter or other law, the provisions of
22 this chapter do not apply in any respect ~~whatever~~ to the West
23 Virginia Board of Probation and Parole, the Public Service

1 Commission, the board of Public Works sitting as such and the
2 Secondary Schools Activities Commission. ~~Provided, That~~ The rules
3 of such agencies shall be filed in the State Register in the form
4 prescribed by this chapter and be effective no sooner than sixty
5 consecutive days after being so filed ~~Provided, however, That~~ The
6 rules promulgated by the state colleges and universities shall only
7 be filed with the higher education governing boards. ~~Provided~~
8 ~~further, That~~ Such agencies may promulgate emergency rules in
9 conformity with section fifteen, article three of this chapter.
10 Rules or amendments thereto authorized by this subsection shall be
11 considered by the agency for adoption not later than six months
12 after the close of public comment. A notice of adoption or
13 withdrawal by the agency shall be filed in the State Register
14 within that period. Failure to file such notice shall constitute
15 withdrawal. The Secretary of State shall note such withdrawal in
16 the State Register immediately upon the expiration of the six-
17 month period.

18 (c) The provisions of this chapter do not apply to rules
19 relating to or contested cases involving the conduct of inmates or
20 other persons admitted to public institutions, the open seasons and
21 the bag, creel, size, age, weight and sex limits with respect to
22 the wildlife in this state, or the conduct of persons in military
23 service. ~~or the receipt of public assistance.~~ Such These rules

1 shall be filed in the State Register in the form prescribed by this
2 chapter and be effective upon filing.

3 (d) Nothing herein shall be construed to affect, limit or
4 expand any express and specific exemption from this chapter
5 contained in any other statute relating to a specific agency, but
6 such exemptions shall be construed and applied in accordance with
7 the provisions of this chapter to effectuate any limitations on
8 such exemptions contained in any such other statute.

9 **ARTICLE 3. RULE MAKING.**

10 **§29A-3-1a. Filing proposed amendments to an existing rule.**

11 ~~(a) Rules promulgated to amend existing rules may be filed on~~
12 ~~a section by section basis without having to refile in the state~~
13 ~~register all of the other sections of an existing series numbered~~
14 ~~rule: *Provided*, That such filing shall list, by proper citation,~~
15 ~~those sections, not amended, which are directly affected by those~~
16 ~~sections amended: *Provided, however*, That amendments so filed When~~
17 ~~amending an existing rule or proposing a new rule, agencies shall~~
18 ~~file all sections of the proposed rule. Each amendment filed to an~~
19 ~~existing rule shall be accompanied by note of explanation as to the~~
20 effect of such amendment and its relation to the existing rules.

21 ~~(b) Rules promulgated to amend existing rules and filed as an~~
22 ~~emergency rule may be filed on a section by section basis without~~
23 ~~having to refile in the state register all of the other sections of~~

1 ~~an existing series numbered rule: *Provided*, That such filing shall~~
2 ~~list, by proper citation, those sections not amended, which are~~
3 ~~directly affected by those sections amended.~~

4 (b) Any rule being repealed shall be filed in its entirety
5 with the rule series provisions stricken. A rule may not be
6 repealed by reference in another rule.

7 **§29A-3-1c. Rules of the Department of Health and Human Services.**

8 (a) The Secretary of the Department of Health and Human
9 Services as authorized by this section, other statute or
10 legislative rule, may publish manuals that provide policy guidance
11 for the implementation and administration of agency programs.
12 Manuals are considered agency-promulgated rules as defined pursuant
13 to this article.

14 (b) Notwithstanding the provisions of section eight, article
15 two of this chapter, the Secretary of the Department of Health and
16 Human Services may make manuals available to the public in an
17 electronic format. Upon the effective date of the manual or any
18 amendment thereto, the secretary shall provide an electronic copy
19 of policy manual to the Secretary of State at no cost. Each
20 manual will be considered addendums to the Code of State Rules, and
21 electronically published as part of the State Register. This
22 manual shall be noticed in the State Register pursuant to article
23 two of this chapter and subject to thirty day public notice and

1 comment period pursuant to section five of this article.

2 (c) The following Department of Health and Human Services
3 manuals are agency-promulgated rules, and subject to the provisions
4 of this section: Bureau for Child Support Enforcement Policy
5 Manual; Income Maintenance Manual; West Virginia Medicaid Provider
6 Manuals; Medicaid State Plan Manual; and the Social Services
7 Manual.

8 **§29A-3-1d. Proposal of federally mandated rules.**

9 (a) Notwithstanding the provisions of section nine of this
10 article, when a legislative rule or amendment to an existing
11 legislative rule is being proposed by an agency to adopt by
12 reference or otherwise comport the rule to a federal counterpart
13 regulation for the purposes of meeting minimum federal requirements
14 for a state administered program in which the state has assumed
15 regulatory responsibility, the agency may promulgate the rule as an
16 agency-promulgated rule without legislative approval upon meeting
17 the requirements of this section.

18 (b) To qualify for agency-promulgated rule status, the rule or
19 amendment to the existing rule shall contain only provisions
20 necessary to fulfill the state's duties associated with
21 administering and complying with the federally delegated program,
22 and may not exceed minimum federal requirements, and to the extent
23 the rule does, it is in violation of this section and shall be

1 severed from the rule and be null and void.

2 (c) The agency shall fulfill all filing, hearing and notice
3 requirements otherwise required pursuant to this article. The
4 agency shall as part of rule filing, provide an explanation of the
5 purpose of the rule and a statement and finding specifically
6 detailing the reasons the rule is eligible for agency-promulgated
7 rule status.

8 (d) The federal regulation or statute shall be electronically
9 attached or otherwise electronically available and be available for
10 inspection at the Secretary of State's office.

11 (e) The rule is effective thirty days following close of
12 public comment period. Rules are to be filed with the Legislative
13 Rule-making and Review Committee as provided in section eleven of
14 this article. The Legislature may disapprove or amend an agency-
15 promulgated rule without limitation.

16 **§29A-3-4. Filing of proposed procedural rules and interpretive**
17 **rules.**

18 (a) When an agency proposes ~~a~~ an agency-promulgated rule,
19 procedural rule or an interpretive rule, the agency shall file in
20 the State Register a notice of its action, including the text of
21 the rule as proposed.

22 (b) All proposed rules filed under subsection (a) of this
23 section shall have a fiscal note attached itemizing the cost of

1 implementing the rules as they relate to this state and to persons
2 affected by the rules. ~~and regulations.~~ Such fiscal note shall
3 include all information included in a fiscal note for either house
4 of the Legislature and a statement of the economic impact of the
5 rule on the state or its residents. The objectives of the rules
6 shall be clearly and separately stated in the fiscal note by the
7 agency issuing the proposed rules. No agency-promulgated rule, -
8 procedural or interpretive rule shall be void or voidable by virtue
9 of noncompliance with this subsection.

10 **§29A-3-6. Filing findings and determinations for rules in State**
11 **Register; evidence deemed public record.**

12 (a) Incident to fixing a date for public comment on a proposed
13 rule, the agency shall promulgate the findings and determinations
14 required as a condition precedent thereto, and state fully and
15 succinctly the reasons therefor and file such findings and
16 determinations in the State Register. If the agency amends the
17 proposed rule as a result of the evidence or comment presented
18 pursuant to section five, such amendment shall be filed with a
19 description of any changes and a statement listing the reasons for
20 the amendment. The agency shall also provide an analysis of the
21 comments received and the reasons for adoption or rejection of any
22 suggested revisions submitted as comments to the proposed rule.

23 (b) The statement of reasons and a transcript of all evidence

1 and public comment received pursuant to notice are public records
2 and shall be carefully preserved by the agency and be open for
3 public inspection and copying for a period of not less than five
4 years from the date of the hearing.

5 **§29A-3-8. Adoption of procedural and interpretive rules.**

6 ~~A~~ An agency-promulgated, procedural and interpretive rule,
7 shall be considered by the agency for adoption not later than six
8 months after the close of public comment and a notice of withdrawal
9 or adoption shall be filed in the State Register within that
10 period. Failure to file such notice shall constitute withdrawal
11 and the Secretary of State shall note such failure in the State
12 Register immediately upon the expiration of the six- month period.

13 ~~A~~ An agency-promulgated, procedural or interpretive rule may
14 be amended by the agency prior to final adoption without further
15 hearing or public comment. No such amendment may change the main
16 purpose of the rule. If the fiscal implications have changed
17 since the rule was proposed, a new fiscal note shall be attached to
18 the notice of filing. Upon adoption of the rule, ~~(including any~~
19 ~~such amendment,~~) the agency shall file the text of the adopted
20 agency-promulgated, procedural or interpretive rule with its notice
21 of adoption in the State Register and the same shall be effective
22 on the date specified in the rule or thirty days after such filing,
23 whichever is later.

1 **§29A-3-9a. Proposal and promulgation of provisional legislative**
2 **rules.**

3 (a) Unless otherwise specified in the implementing statute,
4 whenever the Legislature enacts a law mandating an agency to
5 propose a legislative rule, and further directs the agency to
6 promulgate a provisional legislative rule, the agency shall within
7 sixty days of the effective date of the statute, file the rule for
8 public notice as provided in section five of this article and also
9 submit the rule as a legislative rule as provided pursuant to the
10 requirements of this article. The provisional legislative rule
11 shall be filed by the agency as provided in section six of this
12 article no later than thirty days following the close of public
13 comment. The rule is effective upon final filing by the agency.
14 The provisional legislative rule shall remain effective for fifteen
15 months or until the legislative rule is acted upon by enactment of
16 the Legislature pursuant to section thirteen of this article,
17 whichever occurs first. Any amendment by the agency to the
18 provisional legislative rule is subject to the same notice and
19 effective date requirements. Amendments to the provisional
20 legislative rule do not alter the initial fifteen month effective
21 period for the provisional legislative rule. If the provisional
22 legislative rule expires due to the failure of legislative
23 authorization pursuant to section thirteen of this article, the

1 agency may not refile the same or similar rule as an emergency rule
2 or a provisional legislative rule.

3 (b) A provisional legislative rule may be disapproved by the
4 Secretary of State, acting under the authority provided in section
5 fifteen-a of this article, or the Attorney General, acting under
6 the authority provided in section fifteen-b of this article.

7 **§29A-3-15. Emergency legislative rules; procedure for**
8 **promulgation; definition.**

9 (a) Any agency with authority to propose legislative rules
10 may, ~~without hearing,~~ find that an emergency exists requiring that
11 emergency rules be promulgated and promulgate the same in
12 accordance with this section. Such emergency rules, together with
13 a statement of the facts and circumstances constituting the
14 emergency, and a listing of state agencies, professions, businesses
15 and other identifiable interest groups affected by the proposed
16 emergency rule shall be filed with the Secretary of State, and a
17 notice of such filing shall be published in the State Register:
18 Provided, That failure to list all known state agencies,
19 professions, businesses and other identifiable interest groups may
20 not be the basis for disapproval of the rule or subject the rule to
21 judicial review. The agency shall have a thirty day public
22 comment period for a proposed emergency rule, beginning the day of
23 filing. Upon closure of the public hearing, the ~~Such~~ emergency

1 ~~rules~~ rule shall become effective upon the approval of the
2 Secretary of State in accordance with section fifteen-a of this
3 article or upon the approval of the Attorney General in accordance
4 with section fifteen-b or upon the ~~forty-second~~ forty-fifth day
5 following such filing, whichever occurs first: Provided, that upon
6 a finding that the emergent circumstances existing pursuant to
7 subsection (f) of this section require immediate authorization of
8 the emergency rule, the Secretary of State, acting under the
9 authority provided in section fifteen-a of this article, or the
10 Attorney General, acting under the authority provided in section
11 fifteen-b of this article, may immediately approve the emergency
12 rule for the remainder of the forty-five day comment and review
13 period, at which time that approval of the emergency rule will
14 expire. Any time following the close of public hearing, the final
15 determination on the existence of an emergency may be made by the
16 Secretary of State, acting under the authority provided in section
17 fifteen-a of this article, or the Attorney General, acting under
18 the authority provided in section fifteen-b of this article. Such
19 Emergency rules may adopt, amend or repeal any legislative rule,
20 but the circumstances constituting the emergency requiring such
21 adoption, amendment or repeal shall be stated with particularity
22 and be subject to de novo review by any court having original
23 jurisdiction of an action challenging their validity. ~~Fourteen~~ Two

1 paper copies and an electronic version of the rules and of the
2 required statement shall be filed immediately with the Secretary of
3 State and one paper copy and an electronic copy shall be filed
4 immediately with the Legislative Rule-Making Review Committee.

5 An emergency rule shall be effective for not more than fifteen
6 months and shall expire earlier if any of the following occurs:

7 (1) The Secretary of State, acting under the authority
8 provided for in section fifteen-a of this article, or the Attorney
9 General, acting under the authority provided in section fifteen-b
10 of this article, disapproves the emergency rule because: (A) The
11 emergency rule or an amendment to the emergency rule exceeds the
12 scope of the law authorizing or directing the promulgation thereof;
13 (B) an emergency does not exist justifying the promulgation of the
14 emergency rule; or (C) the emergency rule was not promulgated in
15 compliance with the provisions of this section. An emergency rule
16 may not be disapproved pursuant to the authority granted by
17 paragraphs (A) or (B) of this subdivision on the basis that the
18 Secretary of State or the Attorney General disagrees with the
19 underlying public policy established by the Legislature in enacting
20 the supporting legislation. An emergency rule which would
21 otherwise be approved as being necessary to comply with a time
22 limitation established by this code or by a federal statute or
23 regulation may not be disapproved pursuant to the authority granted

1 by paragraphs (A) or (B) of this subdivision on the basis that the
2 agency has failed to file the emergency rule prior to the date
3 fixed by such time limitation. ~~When the supporting statute~~
4 ~~specifically directs an agency to promulgate an emergency rule, or~~
5 ~~specifically finds that an emergency exists and directs the~~
6 ~~promulgation of an emergency rule, the emergency rule may not be~~
7 ~~disapproved pursuant to the authority granted by paragraph (B) of~~
8 ~~this subdivision.~~ An emergency rule may not be disapproved on the
9 basis that the Legislature has not specifically directed an agency
10 to promulgate the emergency rule, or has not specifically found
11 that an emergency exists and directed the promulgation of an
12 emergency rule.

13 (2) The agency has not previously filed and fails to file a
14 notice of public hearing on the proposed rule within thirty days of
15 the date the proposed rule was filed as an emergency rule; in which
16 case the emergency rule expires on the thirty-first day.

17 (3) The agency has not previously filed and fails to file the
18 proposed rule with the Legislative Rule-Making Review Committee
19 within ninety days of the date the proposed rule was filed as an
20 emergency rule; in which case the emergency rule expires on the
21 ninety-first day.

22 (4) The Legislature has authorized or directed promulgation of
23 an authorized legislative rule dealing with substantially the same

1 subject matter since such emergency rule was first promulgated, and
2 in which case the emergency rule expires on the date the authorized
3 rule is made effective.

4 (5) The Legislature has, by law, disapproved of such emergency
5 rule; in which case the emergency rule expires on the date the law
6 becomes effective.

7 (b) Any amendment to an emergency rule made by the agency
8 shall be filed in the State Register and does not constitute a new
9 emergency rule for the purpose of acquiring additional time or
10 avoiding the expiration dates in subdivision (2), (3), (4) or (5),
11 subsection (a) of this section: *Provided*, That such emergency
12 amendment shall become effective upon the approval of the Secretary
13 of State in accordance with section fifteen-a of this article or
14 upon approval of the Attorney General in accordance with section
15 fifteen-b of this article or upon the ~~forty-second~~ forty-fifth day
16 following such filing, whichever occurs first.

17 (c) Once an emergency rule expires due to the conclusion of
18 fifteen months or due to the effect of subdivision (2), (3), (4) or
19 (5), subsection (a) of this section, the agency may not refile the
20 same or similar rule as an emergency rule.

21 (d) The provision of this section shall not be used to avoid
22 or evade any provision of this article or any other provisions of
23 this code, including any provisions for legislative review and

1 approval of proposed rules. Any emergency rule promulgated for any
2 such purpose may be contested in a judicial proceeding before a
3 court of competent jurisdiction.

4 (e) The Legislative Rule-Making Review Committee may review
5 any emergency rule to determine: (1) Whether the emergency rule or
6 an amendment to the emergency rule exceeds the scope of the law
7 authorizing or directing the promulgation thereof; (2) whether
8 there exists an emergency justifying the promulgation of such
9 emergency rule; and (3) whether the emergency rule was promulgated
10 in compliance with the requirements and prohibitions contained in
11 this section. The committee may recommend to the agency, the
12 Legislature, or the Secretary of State such action as it may ~~deem~~
13 consider proper.

14 (f) For the purposes of this section, an emergency exists when
15 the promulgation of an emergency rule is necessary: (1) For the
16 immediate preservation of the public peace, health, safety or
17 welfare; (2) to comply with a time limitation established by this
18 code or by a federal statute or regulation; or (3) to prevent
19 substantial harm to the public interest.

20 **§29A-3-15a. Disapproval of emergency and provisional legislative**
21 **rules by the Secretary of State; judicial review.**

22 (a) Upon the filing of an emergency rule or filing of an
23 amendment to an emergency rule by an agency, under the provisions

1 of section fifteen of this article, by any agency, except for the
2 Secretary of State, the Secretary of State shall review such rule
3 or such amendment and, within ~~forty-two~~ forty-five days of such
4 filing, shall issue a decision as to whether or not such emergency
5 rule or such amendment to an emergency rule should be disapproved.
6 An emergency rule filed by the Secretary of State shall be reviewed
7 by the Attorney General as provided in section fifteen-b of this
8 article.

9 (b) The Secretary of State shall disapprove an emergency rule
10 or an amendment to an emergency rule if he or she determines:

11 (1) That the emergency rule or an amendment to the emergency
12 rule exceeds the scope of the law authorizing or directing the
13 promulgation thereof; or

14 (2) That an emergency does not exist justifying the
15 promulgation of the emergency rule or the filing of an amendment to
16 the emergency rule; or

17 (3) That the emergency rule or an amendment to the emergency
18 rule was not promulgated in compliance with the provisions of
19 section fifteen of this article.

20 (c) If the Secretary of State determines, based upon the
21 contents of the rule or the supporting information filed by the
22 agency, that the emergency rule should be disapproved, he or she
23 may disapprove such rule without further investigation, notice or

1 hearing. If, however, the Secretary of State concludes that the
2 information submitted by the agency is insufficient to allow a
3 proper determination to be made as to whether the emergency rule
4 should be disapproved, he or she may make further investigation,
5 including, but not limited to, requiring the agency or other
6 interested parties to submit additional information or comment or
7 fixing a date, time and place for the taking of evidence on the
8 issues involved in making a determination under the provisions of
9 this section.

10 (d) If the Secretary of State determines, based upon the
11 contents of the amendment to an emergency rule or the supporting
12 information filed by the agency, that the amendment to the
13 emergency rule should be disapproved, he or she may disapprove such
14 amendment without further investigation, notice or hearing. If,
15 however, the Secretary of State concludes that the information
16 submitted by the agency is insufficient to allow a proper
17 determination to be made as to whether the amendment should be
18 disapproved, he or she may make further investigation, including,
19 but not limited to, requiring the agency or other interested
20 parties to submit additional information or comment or fixing a
21 date, time and place for the taking of evidence on the issues
22 involved in making a determination under the provisions of this
23 section.

1 (e) The Secretary of State shall disapprove a provisional
2 legislative rule upon a finding that the rule was unlawfully
3 promulgated or that the provisional legislative rule or an
4 amendment thereto exceeds the scope of the law authorizing the
5 rule's promulgation.

6 ~~(e)~~ (f) The determination of the Secretary of State shall be
7 reviewable by the Supreme Court of Appeals under its original
8 jurisdiction, based upon a petition for a writ of mandamus,
9 prohibition or certiorari, as appropriate. Such proceeding may be
10 instituted by:

11 (1) The agency which promulgated the emergency rule;

12 (2) A member of the Legislature; or

13 (3) Any person whose personal property interests will be
14 significantly affected by the approval or disapproval of the
15 emergency rule by the Secretary of State.

16 **§29A-3-15b. Disapproval of emergency rules and provisional**
17 **legislative rules by the Attorney General;**
18 **judicial review.**

19 (a) Upon the filing of an emergency rule or filing of an
20 amendment to an emergency rule by the Secretary of State under the
21 provisions of section fifteen of this article, the Attorney General
22 shall review such rule or such amendment and, within ~~forty-two~~
23 forty-five days of such filing, shall issue a decision as to

1 whether or not such emergency rule or such amendment to an
2 emergency rule should be disapproved.

3 (b) The Attorney General shall disapprove an emergency rule or
4 an amendment to an emergency rule if he or she determines:

5 (1) That the emergency rule or an amendment to the emergency
6 rule exceeds the scope of the law authorizing or directing the
7 promulgation thereof; or

8 (2) That an emergency does not exist justifying the
9 promulgation of the emergency rule or the filing of an amendment to
10 the emergency rule; or

11 (3) That the emergency rule or an amendment to the emergency
12 rule was not promulgated in compliance with the provisions of
13 section fifteen of this article.

14 (c) If the Attorney General determines, based upon the
15 contents of the rule or the supporting information filed by the
16 Secretary of State, that the emergency rule should be disapproved,
17 he or she may disapprove such rule without further investigation,
18 notice or hearing. If, however, the Attorney General concludes
19 that the information submitted by the Secretary of State is
20 insufficient to allow a proper determination to be made as to
21 whether the emergency rule should be disapproved, he or she may
22 make further investigation, including, but not limited to,
23 requiring the Secretary of State or other interested parties to

1 submit additional information or comment or fixing a date, time and
2 place for the taking of evidence on the issues involved in making
3 a determination under the provisions of this section.

4 (d) If the Attorney General determines, based upon the
5 contents of the amendment to an emergency rule or the supporting
6 information filed by the agency, that the amendment to the
7 emergency rule should be disapproved, he or she may disapprove such
8 amendment without further investigation, notice or hearing. If,
9 however, the Attorney General concludes that the information
10 submitted by the agency is insufficient to allow a proper
11 determination to be made as to whether the amendment should be
12 disapproved, he or she may make further investigation, including,
13 but not limited to, requiring the agency or other interested
14 parties to submit additional information or comment or fixing a
15 date, time and place for the taking of evidence on the issues
16 involved in making a determination under the provisions of this
17 section.

18 (e) The Attorney General shall disapprove a provisional
19 legislative rule upon a finding that the rule was unlawfully
20 promulgated or that the provisional legislative rule or an
21 amendment thereto exceeds the scope of the law authorizing the
22 rule's promulgation.

23 ~~(e)~~ (f) The determination of the Attorney General shall be

1 reviewable by the Supreme Court of Appeals under its original
2 jurisdiction, based upon a petition for a writ of mandamus,
3 prohibition or certiorari, as appropriate. Such proceeding may be
4 instituted by:

5 (1) The Secretary of State;

6 (2) A member of the Legislature; or

7 (3) Any person whose personal property interests will be
8 significantly affected by the approval or disapproval of the
9 emergency rule by the Attorney General.

NOTE: The purpose of this bill is to make several revisions to the existing process for enacting legislative rules; establishes two classes of rules to replace existing designations; requires agency response to all public comments; provides process for publishing Department of Health and Human Services policy manuals; allows for rules adopting federal mandates to have expedited process, and revises emergency rule making process to allow for a public comment period.

Strike-throughs indicate language that would be stricken from the present law, and underscoring indicates new language that would be added.

§29A-3-1c, §29A-3-1d and §29A-3-9a are new; therefore, strike-throughs and underscoring have been omitted.

This bill was recommended for introduction and enactment by the Joint Judiciary Committee.